



DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 208

[CIS No. 2671-20; DHS Docket No. USCIS-2020-0017]

RIN 1615-AC59

Asylum Interview Interpreter Requirement Modification Due to COVID-19

AGENCY: U.S. Citizenship and Immigration Services (USCIS), Department of Homeland Security (DHS).

ACTION: Temporary final rule; extension.

SUMMARY: The Department of Homeland Security (DHS) is extending, for a third time, the effective date (for 365 days) of its temporary final rule that modified certain regulatory requirements to help ensure that USCIS may continue with affirmative asylum adjudications during the COVID-19 pandemic.

DATES: This temporary final rule is effective from March 16, 2022 through March 16, 2023. As of March 16, 2022, the expiration date of the temporary final rule published at 85 FR 59655 (Sept. 23, 2020), which was extended at 86 FR 15072 (Mar. 22, 2021), and at 86 FR 51781 (Sept. 17, 2021), is further extended from March 16, 2022 through March 16, 2023. If conditions improve and the health concerns posed by COVID-19 are resolved before this temporary final rule expires, DHS will consider publishing a final rule terminating this temporary final rule prior to the expiration of this 365-day extension.

FOR FURTHER INFORMATION CONTACT: Rená Cutlip-Mason, Chief, Division of Humanitarian Affairs, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 5900 Capital Gateway Drive, Camp Springs, MD 20588-0009; telephone (240) 721-3000 (not a toll-free call).

Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at 1-877-889-5627 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

I. Legal Authority to Issue this Rule and other Background

A. Legal Authority

The Secretary of Homeland Security (Secretary) takes this action pursuant to his authorities concerning asylum determinations. The Homeland Security Act of 2002 (HSA), Public Law 107-296, as amended, transferred many functions related to the execution of Federal immigration law to the newly created DHS. The HSA amended the Immigration and Nationality Act (INA or the Act), charging the Secretary “with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens,” INA 103(a)(1), 8 U.S.C. 1103(a)(1), and granted the Secretary the power to take all actions “necessary for carrying out” the immigration laws, including the INA, *id.* 1103(a)(3). The HSA also transferred to DHS responsibility for affirmative asylum applications made outside the removal context. *See* 6 U.S.C. 271(b)(3). That authority has been delegated within DHS to U.S. Citizenship and Immigration Services (USCIS). USCIS asylum officers determine, in the first instance, whether a noncitizen’s affirmative asylum application should be granted. *See* 8 CFR 208.4(b), 208.9. With limited exception, the Department of Justice Executive Office for Immigration Review has exclusive authority to adjudicate asylum applications filed by noncitizens who are in removal proceedings. *See* INA 103(g), 240; 8 U.S.C. 1103(g), 1229a. This broad division of functions and authorities informs the background of this rule.

B. Legal Framework for Asylum

Asylum is a discretionary benefit that generally can be granted to eligible noncitizens who are physically present or who arrive in the United States, irrespective of their status, subject to the requirements in section 208 of the INA, 8 U.S.C. 1158, and implementing regulations, *see* 8 CFR parts 208, 1208.

Section 208(d)(5) of the INA, 8 U.S.C. 1158(d)(5), imposes several mandates and procedural requirements for the consideration of asylum applications. Congress also specified

that the Attorney General and Secretary of Homeland Security “may provide by regulation for any other conditions or limitations on the consideration of an application for asylum,” so long as those limitations are “not inconsistent with this chapter.” INA 208(d)(5)(B), 8 U.S.C. 1158(d)(5)(B). Thus, the current statutory framework leaves the Attorney General (and, after the HSA, also the Secretary) significant discretion to regulate consideration of asylum applications. USCIS regulations promulgated under this authority set agency procedures for asylum interviews, and require that applicants unable to communicate in English “must provide, at no expense to the Service, a competent interpreter fluent in both English and the applicant’s native language or any other language in which the applicant is fluent.” 8 CFR 208.9(g). This requirement means that all asylum applicants who cannot communicate in English must bring an interpreter to their interview. Doing so, as required by the regulation, poses a serious health risk because of the COVID-19 pandemic.

Accordingly, this temporary final rule extends the rule published at 85 FR 59655, for a third time, to continue to mitigate the spread of COVID-19 by seeking to slow the transmission and spread of the disease during asylum interviews before USCIS asylum officers. To that end, this temporary final rule will extend the requirement in certain instances allowing noncitizens interviewed for this discretionary asylum benefit to use USCIS-provided interpreters during affirmative asylum interviews. This temporary final rule also provides that if a USCIS interpreter is unavailable, USCIS will either reschedule the interview and attribute the interview delay to USCIS for the purposes of employment authorization under 8 CFR 208.7, or USCIS may, in its discretion, allow the applicant to provide an interpreter.

C. The COVID-19 Pandemic

On January 31, 2020, the Secretary of Health and Human Services (HHS) declared a public health emergency under section 319 of the Public Health Service Act (42 U.S.C. 247d), in

response to COVID-19, which is caused by the SARS-CoV-2 virus.¹ Effective January 14, 2022, HHS renewed the determination that “a public health emergency exists and has existed since January 27, 2020, nationwide.”² On February 18, 2022, the President issued a continuation of the National Emergency concerning the COVID-19 pandemic.³ As of March 4, 2022, there have been over 440 million confirmed cases of COVID-19 identified globally, resulting in more than 5.9 million deaths.⁴ Approximately 78,428,884 cases have been identified in the United States, with about 242,345 new cases identified in the 7 days preceding February 28, 2022, and approximately 947,625 reported deaths due to the disease.⁵ A more detailed background discussion of the COVID-19 pandemic is found in the original temporary final rule, as well as in the first and second extensions of the rule, and USCIS incorporates the discussions of the pandemic into this extension. *See* 85 FR 59655; 86 FR 15072; 86 FR 51781.

Since publication of the original temporary final rule, variants of the virus that causes COVID-19 have been reported in the United States.⁶ Evidence suggests that some variants may spread more quickly and easily than others and at least one variant may cause more severe illness than other variants.⁷ The COVID-19 Delta and Omicron variants were labeled as Variants of Concern (VOC) by the HHS SARS-CoV-2 Interagency Group (SIG), which defines VOCs as those with evidence of increased transmissibility and severe disease, reduced effectiveness of

¹ HHS, Determination that a Public Health Emergency Exists (Jan. 31, 2020), <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx>.

² HHS, Renewal of Determination that a Public Health Emergency Exists (Jan. 14, 2022), <https://aspr.hhs.gov/legal/PHE/Pages/COVID19-14Jan2022.aspx>.

³ Notice on the Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Pandemic, 87 FR 10289 (Feb. 23, 2022); Proclamation 9994 of March 13, 2020, Declaring a National Emergency Concerning the Coronavirus Disease (COVID-19) Outbreak, 85 FR 15337 (Mar. 18, 2020).

⁴ WHO Coronavirus (COVID-19) Dashboard (updated Mar. 4, 2022), <https://covid19.who.int/>.

⁵ *Id.*

⁶ Centers for Disease Control and Prevention (CDC), SARS-CoV-2 Variant Classifications and Definitions (updated Dec. 1, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/variants/variant-classifications.html>.

⁷ CDC, What You Need to Know About Variants (updated Feb. 25, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/variants/variant.html>.

treatments or vaccines, and diagnostic detection failures.⁸ Following the first Omicron case reported in the United States, on December 1, 2021, there was a rapid increase in infections and hospitalizations with multiple large clusters of outbreaks that peaked in mid-January 2022.⁹ Since mid-January 2022, the number of COVID-19 infections and hospitalizations in the United States has decreased (as of March 6, 2022), although COVID-19 infections continue to be reported.¹⁰

The U.S. Food and Drug Administration (FDA) granted approval for the Pfizer-BioNTech COVID-19 vaccine for individuals 16 years and older in August 2021¹¹ and the Moderna COVID-19 vaccine for individuals 18 years and older in January 2022.¹² While the vaccine is widely accessible in the United States, geographic data indicates a wide disparity in the percentages of fully vaccinated individuals by state, ranging from 50.3 percent in Alabama to 80.9 percent in Rhode Island, not taking into account United States territories.¹³ Although the FDA has determined that approved COVID-19 vaccines are effective in eligible individuals, their effectiveness at preventing infection wanes over time, and thus, CDC guidance states that eligible individuals should receive COVID-19 vaccine booster shots after certain periods of

⁸ CDC, SARS-CoV-2 Variant Classifications and Definitions.

⁹ CDC, Rapid Increase of Omicron Variant Infections in the United States: Management of Healthcare Personnel with SARS-CoV-2 Infection or Exposure (Dec. 24, 2021), https://emergency.cdc.gov/han/2021/pdf/CDC_HAN_460.pdf; CDC, Potential Rapid Increase of Omicron Variant Infections in the United States (updated Dec. 20, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/science/forecasting/mathematical-modeling-outbreak.html>; CDC, COVID Data Tracker – Trends in Number of COVID-19 Cases and Deaths in the U.S. Reported to CDC, by State/Territory (updated Mar. 6, 2022), https://covid.cdc.gov/covid-data-tracker/#trends_dailycases; CDC, COVID Data Tracker: New Admissions of Patients with Confirmed COVID-19 Per 100,000 Population by Age Group, United States (updated Mar. 6, 2022), <https://covid.cdc.gov/covid-data-tracker/#new-hospital-admissions>.

¹⁰ CDC, COVID Data Tracker – Trends in Number of COVID-19 Cases and Deaths in the U.S. Reported by CDC, by State/Territory; CDC, COVID Data Tracker: New Admissions of Patients with Confirmed COVID-19 Per 100,000 Population by Age Group, United States.

¹¹ FDA, FDA Approves First COVID-19 Vaccine (Aug. 23, 2021), <https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine>.

¹² CDC, Moderna COVID-19 Vaccine (also known as Spikevax) Overview and Safety (updated Feb. 1, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/Moderna.html>.

¹³ CDC, COVID Data Tracker – COVID-19 Vaccinations in the United States (updated Mar. 6, 2022), https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-total-admin-rate-total.

time.¹⁴ CDC's decision to begin booster shots in late 2021 was based on information about vaccine effectiveness and the impact of variants on vaccine effectiveness.¹⁵ A January 2022 study indicated that the COVID-19 pandemic is driven by seasonality.¹⁶ Another study indicated that seasonal factors, alongside the increased demand for healthcare resources due to seasonal influenza, should be taken into account when developing future intervention measures.¹⁷

Ongoing research demonstrates that while there is high effectiveness of approved vaccines among eligible individuals, fully vaccinated individuals continue to experience breakthrough COVID-19 infections and may be either symptomatic or asymptomatic.¹⁸ Nevertheless, CDC reports show that individuals who are unvaccinated have a greater risk of testing positive for COVID-19 and a greater risk of dying from COVID-19 than individuals who are fully vaccinated.¹⁹

On February 25, 2022, CDC updated the framework for monitoring the spread of COVID-19 in communities across the United States.²⁰ The framework involves evaluating factors related to the severity of disease, including hospitalizations and hospital capacity, to help determine whether the level of COVID-19 and severe disease are low, medium, or high in a

¹⁴ CDC, COVID-19 Vaccine Booster Shots (updated Feb. 2, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/booster-shot.html>; FDA, COVID-19 Frequently Asked Questions (updated Jan. 7, 2022), <https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/covid-19-frequently-asked-questions>; CDC, Stay Up to Date with Your Vaccines (updated Jan. 16, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/stay-up-to-date.html>.

¹⁵ CDC, COVID-19 Vaccine Booster Shots.

¹⁶ Mario Coccia, COVID-19 Pandemic Over 2020 (With Lockdowns) and 2021 (With Vaccinations): Similar Effects for Seasonality and Environmental Factors, 208 *Environmental Research* (2022), <https://www.sciencedirect.com/science/article/pii/S001393512200038X?via%3Dihub> (last visited Mar. 4, 2022).

¹⁷ NIH, The role of seasonality in the spread of COVID-19 pandemic (Feb. 19, 2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7892320/>.

¹⁸ CDC, The Possibility of COVID-19 after Vaccination: Breakthrough Infections (updated Dec. 17, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/why-measure-effectiveness/breakthrough-cases.html>.

¹⁹ CDC, Rate of COVID-19 Cases and Deaths by Vaccination Status, <https://covid.cdc.gov/covid-data-tracker/#rates-by-vaccine-status>, (last visited Mar. 7, 2022).

²⁰ CDC, CDC Newsroom – Transcript of CDC Media Telebriefing: Update on COVID-19 (Feb. 25, 2022), <https://www.cdc.gov/media/releases/2022/t0225-covid-19-update.html>.

community (known as “COVID-19 community levels”).²¹ Depending on the COVID-19 community level, CDC recommends different individual, household, and community-level prevention strategies, which may or may not include wearing facial covers indoors.²² As a result of CDC’s COVID-19 community levels guidance, the Safer Federal Workforce Task Force, which is led by the White House COVID-19 Response Team, issued updated facial covers and screening testing guidelines on February 28, 2022, for employees, contractors, and visitors to Federal buildings.²³

Widespread testing is available to confirm suspected cases of COVID-19 infection but testing performance varies by type, with antigen tests being less sensitive than Nucleic Acid Amplification Tests (NAATs).²⁴ This may require symptomatic people with negative tests to retest in order to confirm results.²⁵ CDC states that the predictive value of a test will also depend on COVID-19 community levels.²⁶ The use of NAATs in areas with a high COVID-19 community level and increased testing demand may result in test processing delays while a highly specific antigen test may result in many false positives in an area where infection rates are low.²⁷ This is because test predictive values are dependent on pretest probability, or the COVID-19 community level and the clinical context of those being tested.²⁸ CDC guidance states that

²¹ *Id.*

²² CDC, COVID-19 Community Levels (updated Feb. 25, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/science/community-levels.html>.

²³ Safer Federal Workforce, Mask-Wearing, <https://www.saferfederalworkforce.gov/faq/mask-wearing/> (last visited Mar. 3, 2022).

²⁴ CDC, Overview of Testing for SARS-CoV-2 (COVID-19) (updated Feb. 11, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/testing-overview.html>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

individuals who were exposed to a person with COVID-19 may or may not need to self-quarantine depending on vaccination status and whether they develop symptoms.²⁹

II. Purpose of this Temporary Final Rule

USCIS continues its efforts to protect the health and safety of its employees and the public by requiring all federal employees, on-site contractors, and visitors to follow local USCIS guidance on physical distancing and workplace protection guidance consistent with CDC and agency guidance.³⁰ Also, USCIS regularly updates its guidance on facial covers for all employees and members of the public to reflect evolving CDC guidance.³¹

USCIS has conducted 32,012 total asylum interviews between September 23, 2020 and March 7, 2022.³² The original temporary final rule, implemented on September 23, 2020, and its extensions implemented on March 22 and September 20, 2021, and other noted public safety measures have helped mitigate the impact of COVID-19 and have been effective in keeping the USCIS workforce and the public safe. As of February 25, 2022, there have been 4,061 confirmed cases of COVID-19 exposure among USCIS employees and contractors. The overall percentage of positive cases reported among USCIS employees since the start of the pandemic is 14.3 percent.

Therefore, DHS has determined that it is in the best interest of the public and USCIS employees and contractors to extend the temporary final rule for 365 days. Under this third extension, USCIS will continue requiring asylum applicants who are unable to proceed with the interview in English to use government-provided telephonic contract interpreters if the applicants speak one of the 47 languages found on the Required Languages for Interpreter Services Blanket

²⁹ CDC, Quarantine & Isolation (updated Jan. 27, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/your-health/quarantine-isolation.html>.

³⁰ USCIS Response to COVID-19 (updated Jan. 25, 2022), <https://www.uscis.gov/about-us/uscis-response-to-covid-19>.

³¹ *Id.*

³² Between September 23, 2020 and March 10, 2021, USCIS conducted 7,764 asylum interviews. *See* 86 FR at 15074. Between March 10, 2021, and August 8, 2021, USCIS conducted 9,136 asylum interviews. *See* 86 FR at 51784.

Purchase Agreement/U.S. General Services Administration Language Schedule (“GSA Schedule”). If the applicant does not speak or elects to speak a language not on the GSA Schedule, the applicant will be required to bring his or her own interpreter who is fluent in English and the elected language not on the GSA schedule, to the interview. In the second extension of the temporary final rule, published at 85 FR 59655, DHS also amended 8 CFR 208.9(h)(1) by allowing, in USCIS’ discretion, an applicant for asylum to provide an interpreter when a USCIS interpreter is unavailable. *See* 86 FR 51781. Specifically, if a USCIS interpreter is unavailable, USCIS will either reschedule the interview and attribute the interview delay to USCIS for the purposes of employment authorization pursuant to 8 CFR 208.7, or USCIS may, in its discretion, allow the applicant to provide an interpreter.

DHS incorporates into this third extension, the justifications from the original temporary final rule and all subsequent extensions. The measures implemented since the original temporary final rule to protect employees, asylum applicants, and other members of the public, continue to be a priority for USCIS. Additionally, the modification to the second extension (i.e., USCIS exercising discretion to allow an asylum applicant to bring an interpreter to the interview if a contract interpreter is unavailable), will remain in place. The modification has given USCIS flexibility to plan ahead in the limited circumstances when a contract interpreter is expected to be unavailable for an asylum interview, reducing the likelihood of canceled interviews and unused office space. This third extension also incorporates the discussions on the overall benefits of providing telephonic contract interpreters in reducing the risk of contracting COVID-19 for applicants, attorneys, interpreters, and USCIS employees, from the original temporary final rule and all extensions.

III. Discussion of Regulatory Change: 8 CFR 208.9(h)³³

³³ The interpreter interview provisions can be found in two parallel sets of regulations: Regulations under the authority of DHS are contained in 8 CFR part 208; and regulations under the authority of the Department of Justice (DOJ) are contained in 8 CFR part 1208. Each set of regulations contains substantially similar provisions regarding asylum interview processes, and each articulates the interpreter requirement for interviews before an asylum officer. *Compare* 8 CFR 208.9(g), *with* 8 CFR 1208.9(g). This temporary final rule and its extensions revise only the DHS

DHS has determined that there are reasonable grounds for considering potential exposure to SARS-CoV-2, including any emerging variants, as a public health concern and that these grounds are sufficient to extend the temporary final rule modifying the interpreter requirements for asylum applicants in order to lower the number of in-person attendees at asylum interviews. For 365 days following publication of this temporary final rule, DHS will continue to require non-English speaking asylum applicants appearing before USCIS to proceed with the asylum interview using USCIS' interpreter services if they are fluent in one of the 47 languages as discussed in the temporary final rule at 85 FR at 59657.³⁴ Additionally, as provided in 8 CFR 208.9(h)(1), DHS will continue to allow, in USCIS' discretion, an applicant for asylum to provide an interpreter when a USCIS interpreter is unavailable. In these limited circumstances, if a USCIS interpreter is unavailable, USCIS will either reschedule the interview and attribute the interview delay to USCIS for the purposes of employment authorization pursuant to 8 CFR 208.7, or USCIS may, in its discretion, allow the applicant to provide an interpreter. The interpreter will be required to follow USCIS COVID-19 protocols in place at the time of the interview, including sitting in a separate office. Once this temporary final rule is no longer in effect, asylum applicants unable to proceed with an affirmative asylum interview based on a Form I-589, Application for Asylum and for Withholding of Removal, in English before a USCIS asylum officer will be required to provide their own interpreters under 8 CFR 208.9(g).

Given the unique nature of the pandemic and the multiple challenges it has presented in the context of USCIS operations, the agency has had to modify its policies and procedures to adapt. Through the original temporary final rule and the first and second extensions, USCIS adapted and modified its procedures to keep the workforce and public safe while also striving to

regulations at 8 CFR 208.9. Notwithstanding the language of the parallel DOJ regulations in 8 CFR 1208.9, as of the effective date of this action, the revised language of 8 CFR 208.9(h) is binding on DHS and its adjudications for 365 days. DHS is not bound by the DOJ regulation at 8 CFR 1208.9(g).

³⁴ DHS notes that this extension does not modify 8 CFR 208.9(g); rather the extension of the temporary final rule is written so that asylum interviews occurring while the temporary final rule is effective will be bound by the requirements at 8 CFR 208.9(h).

serve the customer. Outside of this rule, USCIS has adapted to the pandemic by developing electronic workflows for conducting interviews and completing the adjudication, and by monitoring language trends and interpreter availability.

DHS noted in the original temporary final rule, first extension, and second extension with modification, that it would evaluate the public health concerns and resource allocations to determine whether to extend the rule. DHS has determined that extending this temporary final rule is necessary for public safety. Accordingly, DHS is extending this temporary final rule for 365 days unless it is necessary to once again extend at a later date. This temporary final rule continues to apply to all affirmative asylum interviews conducted by USCIS across the nation. USCIS has determined that an extension of 365 days is appropriate given that: (1) the pandemic is ongoing;³⁵ (2) the highly contagious Omicron variant is circulating in the United States;³⁶ (3) while vaccines are widely available, data indicates a wide disparity in the percentages of fully vaccinated individuals by state, and fully vaccinated individuals continue to experience breakthrough SARS-CoV-2 infections;³⁷ and (4) although as of March 6, 2022, hospitalizations have decreased from January 2022, when they reached their highest 7-day average admission rate since the start of the pandemic, individuals continue to be hospitalized for COVID-19.³⁸

USCIS first published this temporary final rule on September 23, 2020, and subsequently found it necessary to publish two extensions to continue its mitigation efforts because of the ongoing pandemic.³⁹ The initial temporary final rule and each extension had an effective period

³⁵ See 86 FR 11599; 85 FR 15337; HHS, Renewal of Determination that a Public Health Emergency exists.

³⁶ CDC, Omicron Variant: What You Need to Know (updated Feb. 2, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/variants/omicron-variant.html>; CDC, COVID Data Tracker: Variant Proportions (updated Mar. 1, 2022), <https://covid.cdc.gov/covid-data-tracker/#variant-proportions>.

³⁷ CDC, COVID Data Tracker – COVID-19 Vaccinations in the United States; CDC, The Possibility of COVID-19 after Vaccination: Breakthrough Infections.

³⁸ CDC, COVID Data Tracker: New Admissions of Patients with Confirmed COVID-19 Per 100,000 Population by Age Group, United States.

³⁹ See 85 FR 59655 (Sept. 23, 2020); 86 FR 15072 (Mar. 22, 2021); 86 FR 51781 (Sept. 17, 2021).

of 180 days, which has resulted in this temporary final rule being in effect for 540 days.⁴⁰

Considering the period of time that the pandemic has been ongoing, the number of times USCIS has had to extend this temporary final rule, the continued uncertainty about emerging variants, and the inability to predict when the COVID-19 pandemic will end, USCIS has determined that an additional extension of 180 days will be insufficient and a 365-day extension will better serve the needs of the public and the agency. Extending this temporary final rule for 365 days will provide the public and USCIS with greater certainty and predictability about how long these mitigation efforts will remain in place. That is, with the additional time, the agency can proactively plan ahead and focus on providing consistent services to asylum applicants rather than expending limited resources frequently changing procedures and re-issuing guidance to staff and the public.

Recognizing that the COVID-19 pandemic is ongoing and unpredictable, DHS continues to constantly evaluate the public health concerns and its mitigation efforts. Within the next 365 days, it is possible that conditions may either improve or worsen. If conditions improve and the health concerns posed by COVID-19 are resolved before this temporary final rule expires, DHS will consider publishing a final rule terminating this temporary final rule prior to the expiration of this 365-day extension. However, if prior to the expiration of this extension, conditions remain static or worsen, DHS will again evaluate the public health concerns and resource allocations to determine if another extension is appropriate to further the goals of promoting public safety. After such evaluation and if another extension is determined to be necessary, DHS would publish any such extension via a rulemaking in the *Federal Register*.

IV. Regulatory Requirements

A. Administrative Procedure Act (APA)

DHS is issuing this extension as a temporary final rule pursuant to the APA's "good cause" exception. 5 U.S.C. 553(b)(B). DHS may forgo notice-and-comment rulemaking and a

⁴⁰ *Id.*

delayed effective date because the APA provides an exception from those requirements when an agency “for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. 553(b)(B); *see* 5 U.S.C. 553(d)(3).

The good cause exception for forgoing notice-and-comment rulemaking “excuses notice and comment in emergency situations, or where delay could result in serious harm.” *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004). Although the good cause exception is “narrowly construed and only reluctantly countenanced,” *Tenn. Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir. 1992), DHS has appropriately invoked the exception in this case, for the reasons discussed in this temporary final rule. When it became clear to DHS that the continuing public health emergency would warrant another extension of this temporary final rule, there was not sufficient time to provide notice and receive comment before the second extension would expire. Additionally, on multiple occasions, agencies have relied on this exception to promulgate both communicable disease-related⁴¹ and immigration-related⁴² interim rules, as well as to extend such rules.⁴³ Recently, the Department of State (DOS) and the Federal Emergency Management Agency (FEMA) promulgated or extended rules to mitigate or address the COVID-19 pandemic. On December 13, 2021, DOS issued a temporary final rule, Waiver of Personal Appearance and

⁴¹ HHS Control of Communicable Diseases; Foreign Quarantine, 85 FR 7874 (Feb. 12, 2020) (interim final rule to enable the CDC “to require airlines to collect, and provide to CDC, certain data regarding passengers and crew arriving from foreign countries for the purposes of health education, treatment, prophylaxis, or other appropriate public health interventions, including travel restrictions”); Control of Communicable Diseases; Restrictions on African Rodents, Prairie Dogs, and Certain Other Animals, 68 FR 62353 (Nov. 4, 2003) (interim final rule to modify restrictions to “prevent the spread of monkeypox, a communicable disease, in the United States.”).

⁴² *See, e.g.*, Visas: Documentation of Nonimmigrants Under the Immigration and Nationality Act, as Amended, 81 FR 5906, 5907 (Feb. 04, 2016) (interim rule citing good cause to immediately require a passport and visa from certain H2-A Caribbean agricultural workers to avoid “an increase in applications for admission in bad faith by persons who would otherwise have been denied visas and are seeking to avoid the visa requirement and consular screening process during the period between the publication of a proposed and a final rule”); Suspending the 30-Day and Annual Interview Requirements From the Special Registration Process for Certain Nonimmigrants, 68 FR 67578, 67581 (Dec. 02, 2003) (interim rule claiming the good cause exception for suspending certain automatic registration requirements for nonimmigrants because “without [the] regulation approximately 82,532 aliens would be subject to 30-day or annual re-registration interviews” over a six-month period).

⁴³ *See, e.g.*, Temporary Changes to Requirements Affecting H-2A Nonimmigrants Due To the COVID-19 National Emergency: Partial Extension of Certain Flexibilities, 85 FR 51304 (Aug. 20, 2020) (temporary final rule extending April 20, 2020 temporary final rule); CDC, Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19, 86 FR 34010 (July 01, 2021) (extension order).

In-Person Oath Requirement for Certain Immigrant Visa Applicants Due to COVID-19, which provides flexibility for consular officers to waive the personal appearance of certain repeat immigrant visa applicants. DOS made the temporary final rule effective for 24 months based upon the belief that after 24 months the pandemic will be less acute and ordinary travel resumes.⁴⁴ On April 10, 2020, FEMA published a temporary final rule allocating certain health and medical resources for domestic use, so that these resources may not be exported from the United States without explicit approval by FEMA.⁴⁵ Citing the spread of COVID-19 and the resulting strain on the country's healthcare systems, FEMA explained the measures described in the rule were imperative and necessary to respond to the pandemic.⁴⁶ FEMA's original temporary final rule was extended on August 10, 2020, and then extended again on December 31, 2020, until June 30, 2021.⁴⁷

DHS is publishing this third extension as a temporary final rule because of the continuing COVID-19 pandemic and incorporates into this extension the discussion of good cause from the original temporary final rule and its extensions. As discussed earlier in this preamble, effective January 14, 2022, the Secretary of HHS renewed the determination that "a public health emergency exists and has existed since January 27, 2020 nationwide."⁴⁸ On February 18, 2022, the President issued a notice on the continuation of the state of the National Emergency concerning the COVID-19 pandemic.⁴⁹

⁴⁴ See 86 FR 70735.

⁴⁵ See 85 FR 48113 (Aug. 10, 2020) and 85 FR 20195 (Dec. 31, 2020), respectively.

⁴⁶ *Id.*

⁴⁷ See 85 FR 86835.

⁴⁸ HHS, Renewal of Determination That A Public Health Emergency Exists; Notice on the Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Pandemic; Proclamation 9994 of March 13, 2020, Declaring a National Emergency Concerning the Coronavirus Disease (COVID-19) Outbreak.

⁴⁹ See 87 FR 10289.

As of March 4, 2022, there have been over 440 million confirmed cases of COVID-19 identified globally, resulting in more than 5.9 million deaths.⁵⁰ Approximately 78,428,884 cases have been identified in the United States, with about 242,345 new cases identified in the 7 days preceding February 28, 2022, and approximately 947,625 reported deaths due to the disease.⁵¹ Additionally, CDC is monitoring several variants of the virus that causes COVID-19.⁵² Evidence suggests that some variants may spread faster and more easily than others and at least one variant may be associated with an increased risk of severe illness.⁵³ Although vaccines are widely accessible, there is wide disparity in the percentages of vaccinated individuals by state.⁵⁴

Ongoing research demonstrates that while there is high effectiveness of approved vaccines among eligible individuals, fully vaccinated individuals continue to experience breakthrough COVID-19 infections and may be either symptomatic or asymptomatic.⁵⁵ Nevertheless, CDC reports show that individuals who are unvaccinated have a greater risk of testing positive for COVID-19 and a greater risk of dying from COVID-19 than individuals who are fully vaccinated.⁵⁶ Given the continuing national emergency caused by COVID-19, there are still urgent and compelling circumstances to extend and continue this temporary final rule. USCIS cannot predict when the pandemic will end and believes that it is necessary to extend and continue this temporary final rule for another 365 days or until conditions improve and the health concerns posed by COVID-19 are mitigated to such a degree that these safety efforts are no longer necessary.

⁵⁰ WHO Coronavirus (COVID-19) Dashboard.

⁵¹ *Id.*

⁵² CDC, SARS-CoV-2 Variant Classifications and Definitions.

⁵³ CDC, What You Need to Know About Variants.

⁵⁴ CDC, COVID Data Tracker – COVID-19 Vaccinations in the United States.

⁵⁵ CDC, The Possibility of COVID-19 after Vaccination: Breakthrough Infections.

⁵⁶ CDC, Rate of COVID-19 Cases and Deaths by Vaccination Status.

Throughout the COVID-19 pandemic, USCIS has continued to experience an increase in the affirmative asylum caseload, which, in turn, has created challenges in accommodating the interpretation needs of asylum applicants. Surges in other case types have also required USCIS to divert contract interpreter resources away from affirmative asylum. The increases continue presenting challenges to the agency and thus require USCIS to keep these procedures in place for an additional 365 days.

For the reasons stated, including the need to be responsive to the operational demands and challenges caused by the ongoing COVID-19 pandemic, DHS believes it has good cause to determine that ordinary notice and comment procedure is impracticable for this temporary action, and that moving expeditiously to make this change is in the best interest of the public.

Based on the continuing health emergency, USCIS continues to implement mitigation measures,⁵⁷ and concluded that the good cause exceptions in 5 U.S.C. 553(b)(B) and (d)(3) apply to this temporary final rule extension. Delaying implementation of this rule until the conclusion of notice-and-comment procedures and the 30-day delayed effective date would be impracticable and contrary to the public interest due to the need to continue agency operations, while continuing to mitigate the risks associated with the spread of COVID-19.

As of March 7, 2022, USCIS had 440,185 asylum applications, on behalf of 690,172 noncitizens, pending final adjudication. Ninety-five percent of these pending applications are awaiting an interview by an asylum officer. The USCIS backlog will continue to increase at a faster pace if USCIS is unable to safely and efficiently conduct asylum interviews.⁵⁸

This temporary final rule extension is promulgated as a response to COVID-19 and emerging variants. It is temporary, limited in application to only those asylum applicants who

⁵⁷ See USCIS Response to COVID-19.

⁵⁸ DHS recognizes that the backlog has increased since the original temporary final rule was extended; however, if all applicants were required to bring their own interpreter as was done pre-COVID-19, the interpreter may have to sit in a separate office during the interview to mitigate potential COVID-19 exposure, thereby reducing available office space to schedule additional interviews in a safe manner. This would likely increase the backlog at a faster rate than under this rule.

cannot proceed with the interview in English, and narrowly tailored to mitigate the spread of COVID-19. To not extend such a measure could cause serious and far-reaching public safety and health effects.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions). A regulatory flexibility analysis is not required when a rule is exempt from notice-and-comment rulemaking.

C. Unfunded Mandates Reform Act of 1995

This temporary final rule extension will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

D. Congressional Review Act

OMB's Office of Information and Regulatory Affairs has determined that this action is not a major rule as defined by Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (also known as the Congressional Review Act). 5 U.S.C. 804(2). This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

E. Executive Order 12866 and Executive Order 13563

Executive Orders (E.O.) 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and

safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This rule is designated a significant regulatory action under E.O. 12866. Accordingly, the Office of Management and Budget (OMB) has reviewed this regulation. DHS, however, is proceeding under the emergency provision of Executive Order 12866 Section 6(a)(3)(D) based on the need to move expeditiously during the current public health emergency.

This action will continue to help asylum applicants proceed with their interviews in a safe manner, while protecting agency staff throughout the next year or until the health concerns posed by COVID-19 are resolved. As a result of the temporary final rule and subsequent extensions, USCIS has conducted 32,012 total asylum interviews between September 23, 2020 and March 7, 2022. This third extension is not expected to result in any additional costs to the government. In addition, even with the provision that permits, at USCIS' discretion, an applicant for asylum to provide an interpreter when a contract interpreter is unavailable, there are no additional costs to the applicant relative to what would be the requirements if the temporary final rule were not extended. In those limited circumstances, the interpreter will still be required to follow USCIS COVID-19 protocols in place at the time of the interview, including, but not limited to, sitting in a separate office. Following those COVID-19 protocols will not result in any additional costs for either the applicant or the interpreter.

Such contract interpreters will continue to be provided at no cost to the applicant. USCIS has an existing contract to provide telephonic interpretation and monitoring in interviews for all of its case types. USCIS has provided contract monitors for many years at interviews where the applicant brings an interpreter. In other words, almost all interviews that utilize a USCIS provided interpreter under this temporary final rule would have required instead a contracted monitor during asylum interviews conducted pre-pandemic. Additionally, the cost of monitoring and interpretation are identical under the current contract and monitors are no longer needed for interviews conducted through a USCIS-provided contract interpreter. Therefore, the continued

extension of the temporary final rule is projected to be cost neutral or negligible for the government because USCIS is already paying for these services even without this rule.

In the limited circumstances where a contract interpreter is unavailable, USCIS will either reschedule the interview and attribute the interview delay to USCIS for the purposes of employment authorization pursuant to 8 CFR 208.7, or USCIS may, in its discretion, allow the applicant to provide an interpreter. In such cases, the applicant would be in the same position they would have been without this action.

DHS recognizes there are both quantitative and qualitative benefits that could be realized by providing an applicant for asylum the opportunity to bring their own interpreter when a contract interpreter is unavailable, such as the costs avoided that would otherwise be incurred due to rescheduling if a contract interpreter is unavailable – both for the applicant and USCIS – and the overall positive effect on applicants of having their asylum application timely adjudicated. Once this rule is no longer in effect, asylum applicants unable to proceed with an affirmative asylum interview before a USCIS asylum officer in English will again be required to provide their own interpreters under 8 CFR 208.9(g).

F. Executive Order 13132 (Federalism)

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

G. Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988.

H. Paperwork Reduction Act

This rule does not propose new, or revisions to existing, “collection[s] of information” as that term is defined under the Paperwork Reduction Act of 1995, Public Law 104-13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320. As this would only span 365 days, USCIS does not anticipate a need to update the Form I-589, Application for Asylum and for Withholding of Removal, despite the existing language on the form instructions regarding interpreters. USCIS will continue to post updates on its Form I-589 website, <https://www.uscis.gov/i-589>, and other asylum and relevant webpages regarding the interview requirements in this regulation, as well as provide personal notice to applicants via the interview notices issued to applicants prior to their interview.

List of Subjects in 8 CFR Part 208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

Accordingly, for the reasons set forth in the preamble, the Secretary of Homeland Security amends 8 CFR part 208 as follows:

PART 208 – PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

1. The authority citation for part 208 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Pub. L. 110-229; 8 CFR part 2; Pub. L. 115-218.

2. Effective from March 16, 2022 through March 16, 2023, amend § 208.9 by revising paragraph (h) introductory text to read as follows:

§208.9 Procedure for interview before an asylum officer.

* * * * *

(h) *Asylum applicant interpreters.* For asylum interviews conducted between March 16, 2022, through March 16, 2023:

* * * * *

Alejandro Mayorkas,

Secretary,

U.S. Department of Homeland Security.

[FR Doc. 2022-05636 Filed: 3/15/2022 8:45 am; Publication Date: 3/16/2022]